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**ORIGINAL**

**Lisa M. Chandler**

March 9, 1999

**Ms. Magalie Roman Salas**  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W., Room TW-A325  
Washington, D.C. 20554

**RECEIVED**

**VIA FEDERAL EXPRESS**

**MAR 10 1999**

**FCC MAIL ROOM**

**Re: MM Docket No. 93-25**  
**Petition for Reconsideration of the Small Cable Business Association**

Dear Ms. Salas:

On behalf of the Small Cable Business Association ("SCBA"), we enclose an original and eleven (11) copies of the above-referenced Petition for Reconsideration.

In addition, we provide a "FILE COPY." We ask that you date-stamp and return it in the enclosed Federal Express envelope.

If you have any questions, please call us.

Very truly yours,

*Lisa M. Chandler*

Lisa M. Chandler

Enclosures

cc: Small Cable Business Association

cc: Chairman William E. Kennard  
Commissioner Michael Powell  
Commissioner Gloria Tristani  
Commissioner Susan Ness  
Commission Harold Furchtgott-Roth  
Regina Keeney, Chief, International Bureau  
Rosalee Chiara, Deputy Chief, Satellite Policy Branch

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**ORIGINAL**

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of

Implementation of Section 25  
of the Cable Television Consumer  
Protection and Competition Act of 1992

Direct Broadcast Satellite Public  
Interest Obligations

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MM Docket 93-25

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PETITION FOR RECONSIDERATION  
OF THE  
SMALL CABLE BUSINESS ASSOCIATION

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March 9, 1999

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	THE COMMISSION FAILED ITS STATUTORY MANDATE TO REVIEW WAYS TO PRESERVE OR PROMOTE LOCALISM THROUGH DBS. ....	2
A.	Congress Gave the Commission a Clear Mandate. ....	2
B.	The Commission Failed to Satisfy the Statutory Mandate. ....	5
1.	The <i>DBS Public Interest Order</i> lacks any meaningful analysis. . .	5
2.	The Commission based its decision on a stale record. ....	6
3.	The Commission failed to consider the rapidly changing nature of the DBS industry. ....	7
a.	The Commission ignored DBS' providers current practice and future plans regarding local programming. ....	8
b.	Technology exists to permit local programming. ....	10
4.	The Commission failed to consider legislative efforts to remove legal impediments to widespread local service. ....	12
C.	The Commission Must Revisit the Issue of Localism .....	14
III.	RECENT SIGNIFICANT CHANGES IN THE COMMISSION'S FACTUAL ASSUMPTIONS RENDERS THE COMMISSION'S ANALYSIS INVALID. ....	15
A.	Recent Mergers Will Result in Surviving DBS Providers Controlling Significant Additional Spectrum. ....	15
B.	Media Concentration Requires Greater Protection of Localism. ....	16
IV.	CONCLUSION .....	18

## SUMMARY

In an effort to advance competition between direct broadcast satellite ("DBS") providers and cable at all costs, the Commission ignored an important statutory mandate. The Commission appears willing to sacrifice important public policy objectives, including localism, in the name of competition. Despite the Commission's one-sided approach, Congress requires a balance between competition and localism.

Congress remains concerned about DBS' impact on localism. Localism has served as the cornerstone of communications policy for the past 65 years. In the 1992 Cable Act, Congress sent a clear message to the Commission that it remained concerned about DBS' impact on localism. It required the Commission to consider how DBS can and will foster localism or, at minimum, how to regulate it to protect localism.

The Commission performed a cursory analysis of localism issues. The Commission's analysis of this difficult issue in a complex and rapidly changing business and technological environment, barely occupies seven paragraphs of its Order. The Commission's analysis fails to fulfill the statutory requirement:

- ◆ The Commission fails to provide any meaningful analysis of DBS' current impact on localism or the rapidly changing technological or business environment.
- ◆ The Commission relied on a stale record created almost five years ago. Although the Commission "refreshed" the record, this was still almost 19 months before its decision. Since then, the Commission has taken no further evidence on this issue. The intervening time has seen some of the most dramatic changes in the DBS industry. If the Commission had considered these changes, it likely would have reached a different decision.

- ◆ The Commission failed to consider the rapidly changing nature of both the DBS business environment (as evidenced by the two mega-mergers announced in the weeks following release of the Commission's Order) and the technological environment (as evidenced by the comments of Northpoint Technology and Capitol Broadcasting, among others, in other Commission proceedings).
- ◆ Following repeated recent initiatives for legislation to remove barriers to DBS providers' carriage of local signals, the Commission dismissed issues involving local-into-local retransmissions, citing the lack of authorizing legislation.

The Commission's narrow examination of a "snapshot" of the DBS industry failed to provide the balanced and comprehensive analysis Congress mandated. Congress ordered the Commission to examine the DBS industry and to determine how developments in technology and other advances would accommodate localism. The Commission conducted no such analysis. SCBA requests that the Commission conduct the full and reasoned analysis Congress required.

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

<b>In the Matter of</b>	)	
	)	
<b>Implementation of Section 25</b>	)	<b>MM Docket 93-25</b>
<b>of the Cable Television Consumer</b>	)	
<b>Protection and Competition Act of 1992</b>	)	
	)	
<b>Direct Broadcast Satellite Public</b>	)	
<b>Interest Obligations</b>	)	

**PETITION FOR RECONSIDERATION**

**I. INTRODUCTION**

The Small Cable Business Association ("SCBA") timely files this Petition for Reconsideration<sup>1</sup> to address critical deficiencies in the Commission's decision in the above-captioned proceeding.<sup>2</sup> As SCBA discusses more fully below, the Commission, in its *DBS Public Interest Order*, fails to meet its statutory obligation under 47 U.S.C.S. § 335(a) to consider "opportunities that the establishment of direct broadcast satellite service provides

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<sup>1</sup> See *In the Matter of Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992: Direct Broadcast Satellite Public Interest Obligations*, Report and Order in MM Docket 93-25, FCC 98-307 (released November 25, 1998) ("*DBS Public Interest Order*"). The Commission's decision appeared in the Federal Register on February 8, 1999. See 64 FR 5951. Under 47 C.F.R. §§ 1.429(d) and 1.4(b)(1), a party must file its petition for reconsideration within 30 days of that date, that is, by March 10, 1999.

<sup>2</sup> SCBA has an interest in this proceeding as a participant in the Commission's earlier rulemaking proceeding. See *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Service Obligations*, Comments of the Small Cable Business Association in MM Docket No. 93-25 (filed April 28, 1997) ("*SCBA Public Interest Comments*").

for the principle of localism under [the Communications] Act, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service.”<sup>3</sup>

SCBA files this Petition on behalf of its nearly 300 member smaller cable businesses and their small cable systems (collectively “small cable”) that serve more than 2.3 million subscribers nationwide. The majority of SCBA’s members have fewer than 1,000 subscribers total. SCBA was formed in 1993 by smaller, independent cable businesses to represent the collective interests of its members and to speak with a unified voice regarding issues affecting their businesses. SCBA regularly represents its members’ interests in Commission proceedings to inform the Commission of characteristics and concerns of smaller and independently owned cable businesses and to ensure that Commission decisions do not unfairly and adversely impact its members’ businesses.

## **II. THE COMMISSION FAILED ITS STATUTORY MANDATE TO REVIEW WAYS TO PRESERVE OR PROMOTE LOCALISM THROUGH DBS.**

### **A. Congress Gave the Commission a Clear Mandate.**

Congress gave the Commission a clear mandate to consider ways to promote, or, at least, regulate direct broadcast satellite (“DBS”) services to preserve localism. As part of a rulemaking to impose public interest obligations on DBS providers, Congress directed the Commission to “examine the opportunities that establishment of direct broadcast satellite service provides for the principle of localism under [the Communications Act], and the methods by which such principle may be served through technological and other

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<sup>3</sup> See 47 U.S.C.S. § 335(a).

developments in, or regulation of, such service.”<sup>4</sup> Commission consideration of opportunities for furthering localism or, at a minimum, protection of localism was mandatory, not discretionary.

“[T]he starting point in every case involving statutory construction is ‘the language employed by Congress.’”<sup>5</sup> Generally, “the Commission’s ‘construction of a statutory scheme it is entrusted to administer’ is entitled to great deference.”<sup>6</sup> Where Congress’ intent is clear, the Commission must follow it.<sup>7</sup> If, however, the statute is silent or Congress’ intent is ambiguous, “the principle of deference requires [a court] to determine . . . whether [the agency’s choice] is ‘reasonable,’ and if so, afford it controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute.”<sup>8</sup>

Congress’ directive required the Commission to consider not only the state of the DBS industry at the time of the Commission’s decision but also the impact of future trends

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<sup>4</sup> See 47 U.S.C.S. § 335(a) (emphasis added).

<sup>5</sup> See *CBS, Inc. v. FCC*, 453 U.S. 367, 377 (1981) (internal citation omitted).

<sup>6</sup> See *National Association for Better Broadcasting v. FCC*, 849 F.2d 665, 668 (D.C. Cir. 1988) (citing *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984)). The judiciary, as “the final authority on issues of statutory construction . . . must reject administrative constructions which are contrary to clear congressional intent.” *Chevron*, 467 U.S. at 843, n. 9.

<sup>7</sup> See *NABB v. FCC*, 849 F.2d at 668 (citing *Chevron*, 467 U.S. at 842-43). Before giving deference to an agency’s construction, a reviewing court must first determine whether “Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842-43.

<sup>8</sup> See *NABB v. FCC*, 849 F.2d at 669.



and developments. The statutory language makes this point clear. With Section 25, Congress sought for the Commission to consider both the opportunities that DBS currently provides for localism “and the methods by which such principle may be served through technological and other developments in, or regulation of, such service.”<sup>9</sup> The latter phrase demonstrates that Congress necessarily contemplated Commission consideration of how future developments in the DBS industry or regulation of its service could serve the principle of localism.

The Commission’s own words evidence the absence of ambiguity regarding Congress’ intent with respect to Commission consideration of opportunities for localism. In its Notice of Proposed Rulemaking, the Commission interprets the legislative history of Section 25 as directing the Commission to “consider ‘the implications of the establishment of DBS systems for the principle of localism under the 1934 Act’ and how that principle may be served by technological developments or regulation.”<sup>10</sup> The *DBS Public Interest Order*, however, suggests that “in its zeal to promote this new [DBS] technology, the FCC gave short shrift to certain of its statutory obligations.”<sup>11</sup>

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<sup>9</sup> See 47 U.S.C.S. § 335(a).

<sup>10</sup> See *In the Matter of Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992: Direct Broadcast Satellite Service Public Service Obligations*, Notice of Proposed Rule Making in MM Docket No. 93-25, 8 FCC Rcd 1589 at ¶ 31 (1993) (“*DBS Public Interest NPRM*”) (citing S. Rep. No. 102-92, 102d Cong., 1<sup>st</sup> Sess (1991) at 92).

<sup>11</sup> See *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1195 (D.C. Cir. 1984).

**B. The Commission Failed to Satisfy the Statutory Mandate.**

**1. The *DBS Public Interest Order* lacks any meaningful analysis.**

The *DBS Public Interest Order* fails to offer any meaningful analysis regarding the opportunities for DBS to promote or, at minimum, preserve localism. The Commission instead circumvents Congress' directive, claiming that technical and legal issues prevent it from acting.<sup>12</sup> The *DBS Public Interest Order* states:

To the extent that DBS providers, by law, cannot offer local signal retransmission, the Commission could not require DBS providers to offer local signal retransmission. Moreover, although there have been significant technological developments in the DBS industry since the Commission first developed rules for DBS and some DBS providers are providing limited local service, no DBS provider has the technical capability to provide local service to all markets in the country. We agree with APTS/CPB, however, that if the legal and technical issues regarding localized programming are resolved, we may consider requiring DBS providers to offer some amount of locally-oriented programming. We also support legislative changes to the Satellite Home Viewer Act that would remove any legal impediments to local signal retransmission by DBS licensees. Allowing DBS to provide local programming would expand the scope of the services DBS providers could offer and could enhance significantly DBS providers' ability to compete with cable.<sup>13</sup>

The Commission bases its decision upon a "snapshot" of the current DBS industry — a perspective frozen in time, ignoring recent changes and trends in the DBS industry, as well as legislative efforts to remove any legal impediments. This narrow perspective prevents the Commission from meeting its statutory obligation to examine how localism "may be

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<sup>12</sup> See *DBS Public Interest Order* at ¶¶ 49-54.

<sup>13</sup> See *DBS Public Interest Order* at ¶ 54.

served by technological developments or regulation.”<sup>14</sup>

## **2. The Commission based its decision on a stale record.**

The Commission’s failure to adequately consider opportunities for DBS to serve the principle of localism — or opportunities to prevent DBS harm to localism — largely stems from the fact that the Commission based its decision on a stale record. A review of this proceeding evidences this.

This proceeding has remained open for more than five years. In 1993, the Commission commenced this rulemaking proceeding and requested public comment<sup>15</sup> in response to Congress’ directive in Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”).<sup>16</sup> Shortly thereafter, a federal district court found Section 25 unconstitutional,<sup>17</sup> which “effectively froze the DBS Public Interest NPRM pending the Commission’s appeal of that decision.”<sup>18</sup> After a federal appeals court reversed that decision in 1996,<sup>19</sup> the Commission sought to “update and refresh the record

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<sup>14</sup> See *DBS Public Interest NPRM*, 8 FCC Rcd 1589 at ¶ 31.

<sup>15</sup> See generally *DBS Public Interest NPRM*, 8 FCC Rcd 1589.

<sup>16</sup> See 47 U.S.C.S. § 335(a).

<sup>17</sup> See *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1 (D.D.C. 1993).

<sup>18</sup> See *In the Matter of Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992: Direct Broadcast Satellite Service Obligations*, Public Notice in MM Docket No. 93-25, 12 FCC Rcd 2251 (1997) (“*DBS Public Interest Public Notice*”).

<sup>19</sup> See *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996).

in this proceeding."<sup>20</sup> The opportunity for comment expired April 30, 1997.<sup>21</sup> The Commission, however, did not issue its decision until late-November 1998 — almost 19 months later.

At the time Congress enacted Section 25 of the 1992 Cable Act, the DBS industry was in its infancy. Since then, DBS has grown significantly and today represents a formidable competitor to cable.<sup>22</sup> Some critical changes in the DBS industry transpired during that period of time between the end of the comment period in 1997 and the Commission's decision in late 1998. The Commission's failure to consider these changes renders its decision arbitrary.

**3. The Commission failed to consider the rapidly changing nature of the DBS industry.**

The *DBS Public Interest Order* ignores both technological advancements and DBS providers' business plans when it concluded that "no DBS provider has the technical capability to provide local service to all markets in the country."<sup>23</sup> It instead made limited

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<sup>20</sup> See *DBS Public Interest Public Notice*, 12 FCC Rcd 2251.

<sup>21</sup> See *DBS Public Interest Public Notice*, 12 FCC Rcd 2251.

<sup>22</sup> See *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fifth Annual Report in CS Docket No. 98-102, FCC 98-335 (released December 23, 1998) ("*Fifth Annual Video Competition Report*"). In his statement accompanying the *Fifth Annual Video Competition Report*, Commissioner Powell acknowledged the inroads made by DBS, stating "DBS clearly is shaping up as the singularly most significant competitive alternative to cable. And, it is coming on strong. DBS subscribers increased by 40% last year. Two out of three new subscribers of multi-channel video chose DBS over cable. . . With the flurry of acquisition activity we have seen by the leading DBS providers in recent weeks, DBS's future looks bright." *Fifth Annual Video Competition Report* (Statement of Commissioner Michael Powell).

<sup>23</sup> See *DBS Public Interest Order* at ¶ 54.

superficial references to technological impediments as justifying the Commission's failure to address opportunities for DBS providers to serve localism. For example, the Commission's decision noted that:

- "[T]he national scope of satellite technology makes anything but national broadcasting an inefficient use of very valuable spectrum."<sup>24</sup>
- "DBS providers' limited channel capacity and national service technology prevent delivery of service to local markets throughout the country."<sup>25</sup>

The Commission's decision remains counterintuitive considering (1) DBS providers' current practice and future plans to provide limited and select local programming and (2) the existence of technology that permits DBS providers to provide local programming.

**a. The Commission ignored DBS' providers current practice and future plans regarding local programming.**

DBS providers' current practice of providing limited local programming that they select demonstrates that both opportunities for localism (through local carriage) and possibilities for harm to localism (through limited local carriage) exist. EchoStar presently provides local service in 13 markets<sup>26</sup> and seeks additional spectrum, in part to broaden

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<sup>24</sup> See *DBS Public Interest Order* at ¶ 52.

<sup>25</sup> See *DBS Public Interest Order* at ¶ 52.

<sup>26</sup> See *Fifth Annual Video Competition Report* at ¶ 67 (citing EchoStar Communications Corp., *Dish Network Launches DISH NETS Local Channels in Pittsburgh* (press release), Sept. 15, 1998; EchoStar Communications Corp., *Dish Networks is the Only One!* (press release), Jan. 8, 1998). Significantly, the Commission's decision acknowledged that EchoStar already offers local signals and plans to expand local service. See *DBS Public Interest Order* at note 116.

its ability to offer local signals.<sup>27</sup> Should the Commission approve EchoStar's application to acquire MCI Telecommunications Corporation's full-CONUS channels at the 110° W.L. orbital location, SCBA estimates that EchoStar could expand its local service to include at least 100 television markets.<sup>28</sup> EchoStar's present local service and planned expansion indicates that DBS providers presently have the ability to offer at least some local programming. To the extent that such capacity exists, opportunities to promote and preserve localism exist.<sup>29</sup> To the extent that such capacity exists and is used to only carry limited local programming in each market as selected by the DBS provider, the greater potential to harm localism exists. Ignoring these facts, of which the Commission had notice, evidences the Commission's disregard for meeting its statutory obligation to

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<sup>27</sup> See *In re Application of MCI Telecommunications Corp. and EchoStar 110 Corporation For Consent to Assignment of Authorization to Construct, Launch, and Operate a Direct Broadcast Satellite System Using 28 Frequency Channels at the 110° W.L. Orbital Location*, File No. SAT-ASG-19981202-00093 (filed December 2, 1998) at 14 ("MCI-EchoStar 110° W.L. Assignment Application").

<sup>28</sup> See *MCI-EchoStar 110° W.L. Assignment Application*, Petition to Deny of the Small Cable Business Association in File No. SAT-ASG-19981202-00093 (filed January 14, 1999).

<sup>29</sup> For example, SCBA has previously suggested an immediately effective opt-out provision. See *SCBA Public Interest Comments* at 23-24. SCBA recognized that "immediate implementation of must-carry is not feasible for many DBS providers. Nevertheless, the harm they inflict continues each day. Therefore, rather than adopting transition periods during which localism continues to take a beating, the Commission should consider an immediately effective opt-out provision. Under this provision, a DBS provider that did not, could not or chose not to comply with must-carry requirements would pay a percentage of gross revenues into a national fund to support local program providers and distributors. This fund would help ensure the continued financial viability of local programming sources as they attempt to compete with a national service that can deliver its product at a substantially lower cost, in part because it escapes all local public interest requirements." *Id.*

consider opportunities for the promotion or protection of localism.

**b. Technology exists to permit local programming.**

Provision of all local services would foster localism. Despite some DBS providers' protests to the contrary,<sup>30</sup> technology exists for DBS providers to offer all local signals. According to Northpoint Technology, technology currently exists that would "enable current DBS subscribers and others to receive all local broadcast signals in a high quality digital format using the exact same consumer equipment currently in the consumer's home."<sup>31</sup> Northpoint Technology ("Northpoint") has conducted experimental tests<sup>32</sup> of its "advanced digital wireless system" that "can provide local television signals without interference to existing services."<sup>33</sup> Northpoint has previously explained to the Commission that it "can implement its technological solution to the local-into-local problem very economically and in a matter months" and generally using mass produced "off the shelf" consumer

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<sup>30</sup> See *DBS Public Interest Order* at ¶ 52 (discussing DBS providers' opposition to localism requirements based on technical and economical infeasibility).

<sup>31</sup> See *In the Matter of Satellite Delivery of Network Signals To Unserved Households for Purposes of the Satellite Home Viewer Act: Part 73 Definition and Measurement of Signals of Grade B Intensity*, Comments of Northpoint Technology in CS Docket No. 98-201, RM Nos. 9335 and 9345 (filed December 11, 1998) at 4 ("*Northpoint Technology Comments*") (emphasis in original).

<sup>32</sup> Northpoint conducted tests of its technology pursuant to an FCC experimental license in October 1997 and December 1998. See *Northpoint Technology Comments* at 4. The timing of these tests largely coincides with this rulemaking proceeding, suggesting that the Commission should have had notice of the existence of technology that would permit local service by DBS providers.

<sup>33</sup> See *Northpoint Technology Comments* at 4.

equipment.<sup>34</sup> The Commission has even initiated a rulemaking proceeding to consider allocating spectrum for such use.<sup>35</sup>

In addition to Northpoint's technology, other solutions exist. As the Commission has previously acknowledged, Capitol Broadcasting Company, Inc. ("Capitol"), has developed a plan, using spotbeam technology, capable of offering "DBS providers a local station package of all over-the-air, full power, commercial television stations within a given station's designated market area."<sup>36</sup>

Contrary to the Commission's statements in its *DBS Public Interest Order*, technology exists that would allow DBS providers to offer widespread local programming.

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<sup>34</sup> See *Northpoint Technology Comments* at 7.

<sup>35</sup> See *Northpoint Technology Comments* at 4 (citing *Amendment of the Commission's Rules To Authorize Subsidiary Terrestrial Use of the 12.2-12.7 Ghz Band By Direct Broadcast Satellite Licensees and Their Affiliates*, Notice of Proposed Rulemaking, FCC 98-310 (released Nov. 24, 1998)).

<sup>36</sup> See *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fourth Annual Report, 13 FCC Rcd 1034 (released Jan. 13, 1998) at ¶ 58 (discussing Statement of Capitol Broadcasting Company, Inc., before the Subcommittee on Courts and Intellectual Property of the Committee of the Judiciary, U.S. House of Representatives, *Hearing on the Copyright Licensing Regimes Covering Retransmission of Broadcast Signal License* (Oct. 30, 1997)) ("*Fourth Annual Video Competition Report*") (emphasis added). Capitol "has announced its 'Local TV on Satellite' plan for retransmitting local signals by satellite. Capitol states that it will operate a satellite in the Ka-band with 61 spotbeams that will cover the continental United States, Alaska and Hawaii. Capitol intends to offer DBS providers a local station package of all over-the-air, full power, commercial television stations within a given station's designated market area." *Id.*

The Commission's discussion of Capitol's plan as part of its *Fourth Annual Video Competition Report* is significant. The Commission released that Report in January 1998, long before it reached its decision regarding the instant rulemaking proceeding. The Commission therefore should have had notice of the existence of Capitol's solution and considered Capitol's plan when reaching its decision in the *DBS Public Interest Order*.



These solutions may soon offer DBS providers a practical, economical and efficient way to offer local programming. The Commission failed to meet its statutory mandate by omitting any consideration of these options.

The Commission ignored Congress' charge by failing to consider both current and future opportunities for promoting and protecting localism. The Commission should therefore reopen this matter, update the record and give appropriate consideration to both current and future opportunities for the promotion and protection of localism.

**4. The Commission failed to consider legislative efforts to remove legal impediments to widespread local service.**

The Commission refused to impose a carriage requirement to protect all local broadcast signals, justifying its decision, in part, on legal impediments to DBS providers offering of local signals.<sup>37</sup> The Commission, however, stated that it would "consider requiring DBS providers to offer some amount of locally-oriented programming," if "the legal and technical issues regarding localized programming are resolved."<sup>38</sup> The Commission casts its "support [of] legislative changes to the Satellite Home Viewer Act that would remove any legal impediments to local signal retransmission by DBS licensees."<sup>39</sup>

Recent legislative activity seeks to make widespread DBS local-into-local an imminent reality.<sup>40</sup> Commission testimony on changes to the Satellite Home Viewer Act

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<sup>37</sup> See *DBS Public Interest Order* at ¶¶ 53-54.

<sup>38</sup> See *DBS Public Interest Order* at ¶ 54.

<sup>39</sup> See *DBS Public Interest Order* at ¶ 54.

<sup>40</sup> See, e.g., S. 303, 106<sup>th</sup> Cong. (1999); H.R. 89, 106<sup>th</sup> Cong. (1999); S. 247, 106<sup>th</sup> Cong. (1999).

("SHVA"), however, suggests that the Commission's overarching concern involves improved competitiveness of DBS, not localism:<sup>41</sup>

- "Increased competition among multichannel video programming distributors (MVPDs) — particularly competition to cable — has become one of the paramount goals of the Commission. The satellite industry, particularly the direct broadcast satellite (DBS) industry, has proven to be the largest and most successful industry at drawing new subscribers and competing in the marketplace. Today there are nearly 9 million DBS subscribers."
- Describing consumer frustration regarding the inability to obtain local signals via DBS, the Commission noted that "[a]t its core, consumers define this issue as a question of choice, not copyright protection or localism."
- "The overarching values and goals of the Commission are to protect consumers, promote competition and, in seeking to accomplish these goals, maintain fidelity to the law and intent of Congress."
- "The Commission and Congress can work together to fulfill their mutual objective of promoting competition."
- "Local-into-local could make satellite carriers more attractive to consumers, thus increasing their competitive standing with cable."
- "The recommendations . . . offered could significantly advance competition to cable and create more and better choices for consumers."

Considering the efforts of DBS providers, particularly EchoStar, to offer widespread local-into-local, the intense political pressure DBS providers applied last year and the flurry of other judicial, legislative and administrative activity surrounding SHVA,<sup>42</sup> the Commission

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<sup>41</sup> See Statement of Deborah A. Lathen, Chief, Cable Services Bureau, Federal Communications Commission, testifying on behalf of William Kennard, Chairman of the Federal Communications Commission, before the Subcommittee on Telecommunications, Trade and Consumer Protection, House of Representatives, *Hearings on Reauthorization of the Satellite Home Viewer Act* (Feb. 24, 1999) ("FCC SHVA Testimony").

<sup>42</sup> See, e.g., *ABC, Inc. v. PrimeTime 24, Joint Venture*, 17 F. Supp. 2d 467, 1998 U.S. Dist. LEXIS 13308 (M.D.N.C. 1998), *permanent injunction granted* in 17 F. Supp. 2d

should have anticipated renewed congressional action on this matter. To comply with Congress' mandate to consider "methods by which [localism] may be served through . . . other developments in, or regulation of, [DBS] service," the Commission should have, at a minimum, discussed means to protect localism in the event Congress removed the legal impediments to widespread local-into-local DBS transmissions.

**C. The Commission Must Revisit the Issue of Localism.**

To address the issues raised by this Petition and satisfy its statutory obligation to "examine the opportunities that establishment of direct broadcast satellite service provides for the principle of localism under [the Communications Act], and the methods by which such principle may be served through technological and other developments in, or regulation of, such service,"<sup>43</sup> the Commission must grant SCBA's Petition for Reconsideration. Due to significant changes concerning the DBS industry in general, the advent of technological capability of providing all local signals, and likely legislative action to remove legal impediments to DBS local-into-local, the Commission should issue a

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478, 1998 U.S. Dist. LEXIS 13317 (M.D.N.C. 1998); *CBS Broadcasting Inc. v. PrimeTime 24 Joint Venture*, Case No. 96-3650-CIV-NESBITT, 1998 U.S. Dist. LEXIS 20442 (S.D. Fla. 1998), *permanent injunction granted* in 1998 U.S. Dist. LEXIS 20488 (S.D. Fla. 1998); *EchoStar Communications Corp. v. CBS Broadcasting et al.*, Civil Action No. 98-B-2285 (D. Colo), *CBS Broadcasting, et al. v. EchoStar Communications Corporation*, Civil Action No. 98-2651 (S.D. Fla.); see also S. 303, 106<sup>th</sup> Cong. (1999); H.R. 89, 106<sup>th</sup> Cong. (1999); S. 247, 106<sup>th</sup> Cong. (1999); see also *In the Matter of Satellite Carrier Compulsory License; Definition of Unserved Household*, Docket No. RM 98-1, Notice of Inquiry (released January 26, 1998); *In the Matter of Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act*, Report and Order in CS Docket No. 98-201, RM Nos. 9335 and 9345, FCC 99-14 (released Feb. 2, 1999).

<sup>43</sup> See 47 U.S.C.S. § 335(a).

further notice of proposed rulemaking specific to the issue of opportunities for DBS to serve localism. This will provide the Commission with a more accurate and complete picture of the DBS industry generally and the opportunities available to serve localism and protect localism from harm through selective local retransmissions.

### **III. RECENT SIGNIFICANT CHANGES IN THE COMMISSION'S FACTUAL ASSUMPTIONS RENDERS THE COMMISSION'S ANALYSIS INVALID.**

#### **A. Recent Mergers Will Result in Surviving DBS Providers Controlling Significant Additional Spectrum.**

The DBS industry has recently undergone swift and virtually complete consolidation. The most recent activity came just over one week after the Commission released the *DBS Public Interest Order*. The Commission has under consideration several assignment applications, the grant of which would result in two DBS providers controlling all of the full-CONUS DBS spectrum.<sup>44</sup> Assuming Commission approval of all three applications, EchoStar would control 50 full-CONUS DBS frequencies and DIRECTV would control 46 full-CONUS DBS frequencies.<sup>45</sup>

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<sup>44</sup> See *In re Application of USSB II, Inc., United States Satellite Broadcasting Co., Inc. and DIRECTV Enterprises, Inc.*, File No. SAT-T/C-19981217-00098. The USSB-DIRECTV deal involves the transfer of USSB's three frequencies at the 110° W.L. orbital location and its five frequencies at the 101° W.L. orbital location. See also *MCI-EchoStar 110° W.L. Assignment Application*, supra. The MCI-EchoStar transaction involves the transfer of MCI's 28 frequencies at the 110° W.L. orbital location. See also *In re Application of Tempo Satellite, Inc. and DIRECTV Enterprises, Inc. for Consent to Assign Authorization to Construct, Launch and Operate a Direct Broadcast Satellite System Using 11 Frequencies at the 119° W.L. Orbital Location*, File No. SAT-ASG-19990127-00014 ("*Tempo-DIRECTV Assignment Application*").

<sup>45</sup> See *Tempo-DIRECTV Assignment Application*, Public Interest Statement of DIRECTV Enterprises, Inc. at n. 10

## **B. Media Concentration Requires Greater Protection of Localism.**

At least one DBS provider presently offers some local signals and has plans to expand its offerings.<sup>46</sup> Without imposing local programming public interest obligations, e.g., broadcast station carriage requirements in markets where DBS chooses to provide some local signals, DBS providers remain free to cherry pick the local broadcast stations they will offer.<sup>47</sup>

Selective carriage by DBS providers will threaten the financial viability of all stations not carried,<sup>48</sup> most likely, emerging networks, local PBS and independent stations. All television stations will be adversely impacted if not carried by an MVPD that captures even a few percent of a local market's viewers. As noted by the United States Supreme Court, a five percent reduction in viewers would result in an almost \$1.5 million reduction in gross revenue of a large market station.<sup>49</sup> The amount of revenue loss for a small market station would be less; however, non-carriage would still have the same proportionate impact on

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<sup>46</sup> See *MCI-EchoStar 110 ° W.L. Assignment Application*; see also *MCI-EchoStar 110 ° W.L. Assignment Application*, Petition to Deny of the Small Cable Business Association (filed January 14, 1999) ("*SCBA Petition to Deny MCI-EchoStar 110 ° W.L. Assignment Application*").

<sup>47</sup> For example, the increased capacity that EchoStar seeks will provide sufficient capacity to carry some but not all broadcast stations. SCBA estimates that EchoStar's expanded spectrum capacity will permit it to offer the four major networks in at least 100 markets. See *SCBA Petition to Deny MCI-EchoStar 110 ° W.L. Assignment Application* at 7.

<sup>48</sup> For example, assuming EchoStar carries only 400 stations (the four major networks in 100 markets) of the 1,569 total broadcast stations, the financial viability of 1,169 stations remains threatened.

<sup>49</sup> *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 117 S. Ct. 1174, 137 L. Ed. 2d 369, 400 (1997) ("*Turner II*").

a smaller station's smaller budget.

The United States Supreme Court detailed the impact financial deterioration would have on localism.<sup>50</sup> As described in *Turner II*:

[A] television station's audience size directly translates into revenue — large audiences attract larger revenues, through the sale of advertising time. If a station is not carried on cable, and thereby loses a substantial portion of its audience, it will lose revenue. With less revenue, the station can not [sic] serve its community as well. The station will have less money to invest in equipment and programming. The attractiveness of its programming will lessen, as will its audience. Revenues will continue to decline, and the cycle will repeat.<sup>51</sup>

Broadcasters not carried on satellite will experience a similar deterioration in revenues and difficulty in providing local programming. Exclusion by satellite carriers therefore would serve to erode Congress' goal of localism.

SCBA remains an ardent supporter of localism.<sup>52</sup> SCBA never challenged mandatory carriage of analog signals. Rather, it supported the requirement. SCBA's members largely rely on local programming that they retransmit and that they create as integral services to their customers. In fact, small cable represents a significant and often the only multi-channel outlet for the distribution of local programming, especially in rural America. The loss of local broadcast signals as a component of small cable's product line-

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<sup>50</sup> See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 14 S. Ct. 2445 (1994) ("*Turner I*"), *Turner II*, 520 U.S. 180, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997).

<sup>51</sup> *Turner II*, 137 L. Ed. 2d at 399 (citing Hearing on Competitive Issues, at 526-527 (statement of Gary Chapman)).

<sup>52</sup> See *SCBA DBS Public Interest Comments*, *supra*.

up would threaten small cable's financial viability.

Absent a carriage requirement, DBS providers can refuse local broadcast carriage to the detriment of small cable. Unlike DBS, cable generally may not refuse carriage. This creates a critical regulatory imbalance that will hinder long-term competition. DBS refuses to restrict its satellite programming offerings to make room for carriage of all local signals. Nevertheless, many small cable operators must restrict satellite offerings to provide space for all local broadcasters. A DBS provider's unrestrained ability to control broadcast station carriage creates an unlevel playing field, not fair competition.

Absent carriage requirements or other regulations designed to protect and promote localism, local broadcasters, small cable businesses and subscribers will suffer.

#### **IV. CONCLUSION**

Critical deficiencies in the *DBS Public Interest Order* require reconsideration of the Commission's decision. Congress charged the Commission with the task of considering present and future opportunities for DBS to serve localism. The Commission, however, did not satisfy this statutory mandate. The Commission, largely basing its decision on a stale record, closed its eyes to other active dockets before it and to DBS providers' current and planned business practice of offering limited local signals. The Commission also ignored evidence of technology that would permit DBS providers to offer all local signals. Finally, the Commission could have anticipated renewed efforts to pass legislation authorizing local-into-local and suggested ways that DBS could serve localism once such legislation becomes a reality.

Recent consolidation within the DBS industry further mandates reconsideration of

the *DBS Public Interest Order*. A DBS industry controlled by two providers with no regulations serving to promote, protect and preserve localism can severely harm localism and, as a consequence, the viability of small cable. Small cable has remained an ardent supporter of localism, relying on local programming as a critical element of its offerings. Without its continued availability and viability (as a result of unfair competition), small cable cannot remain a viable competitor. Small cable, like DBS, serves rural markets. Consolidation within the DBS industry without restrictions similar to those imposed on cable will create a competitive imbalance and disserve the needs of consumers and local communities.

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